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8
9 UNITED STATES DISTRICT COURT

10 DISTRICT OF ARIZONA

11 In Re Bard IVC Filters Products
12 Liability Litigation

No. MD-15-02641-PHX-DGC

13 SHERR-UNA BOOKER, an individual,
14 Plaintiff,
15 v.
16 C.R. BARD, INC., a New Jersey
corporation and BARD PERIPHERAL
17 VASCULAR, an Arizona corporation,
18 Defendants.

**PLAINTIFF'S MEMORANDUM RE
BARD'S MOTION TO EXCLUDE
DEPOSITION TESTIMONY OF
WITHDRAWN BARD EXPERTS**

(The Honorable David G. Campbell)

20 Plaintiff responds to Bard's objections to Plaintiff using in her case-in-chief the
21 deposition testimony of three defense experts subsequently withdrawn by Bard as expert
22 witnesses. As the Court noted in oral argument, these witnesses' deposition testimony can
23 properly be used by Plaintiff under Rule 32(a) of the Federal Rules of Civil Procedure and
24 Rule 804(b)(1)(A) of the Federal Rules of Evidence.

25 These witnesses are unavailable to testify since Bard has withdrawn them as
26 testifying experts for this trial. Rule 32(a)(4)(D), Fed. R. Civ. P., provides that a party
27 may use a deposition "for any purpose" if the deponent cannot be procured by subpoena
28 for trial. And such testimony would not be subject to a hearsay exception because Rule

1 804(b)(1)(A), Fed. R. Evid., provides an exception to the hearsay rule for “former
2 testimony” including deposition testimony where the witness is unavailable. *See Tatman*
3 *v. Collins*, 938 F.2d 509, 511 (4th Cir. 1991) (holding that deposition could be used at trial
4 under Rule 32(a) and that it was “irrelevant to the issue” who noticed the deposition, when
5 it was taken, or that the opposing party believed the deposition “was initiated only for
6 discovery purposes”). Although Bard’s counsel asked for time to research the issue, no
7 case refutes the straightforward application of Rules 32 and 804 to allow Plaintiff to use
8 Bard’s expert witnesses’ depositions.

9 As the Court noted, apparently all of the case law on the use of depositions of
10 expert witnesses not being called at trial addressed a different exception to the hearsay
11 rule and not the application of Rules 32 and 804. But the depositions of Drs. Stein,
12 Rogers, and Moritz are likewise admissible under that case law and Rule 801, Fed. R.
13 Evid. *Glendale Federal*, the only authority on point that Bard cites, acknowledged the
14 line of federal cases allowing the opposing party to use the other side’s expert deposition,
15 and only ruled to the contrary because in that case the defendants “had only a short time to
16 find experts and should not have been constrained by the need to determine ahead of time
17 who would provide favorable testimony.” *Glendale Fed. Bank, FSB v. U.S.*, 39 Fed. Cl.
18 422, 425 (1997). The Court of Federal Claims went on to say that if it had a situation like
19 this litigation, where both sides had ample time to obtain and disclose experts, its ruling
20 would be different: “On the other hand, neither party should be burdened with the *expense*
21 *of depositing excessive numbers of witnesses only to have them withdrawn prior to trial and*
22 *their testimony rendered unusable as substantive evidence.*” *Id.* (emphasis added). In this
23 litigation, where Bard has had years to secure experts favorable to its positions, and where
24 it continues to disclose these same experts in cases in other jurisdictions, it cannot hide its
25 experts’ unfavorable (to Bard) opinions from the jury under the hearsay rule.

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RESPECTFULLY SUBMITTED this 6th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ *Gay Mennuti*